

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KOLLIN WINBUSH,

Defendant-Appellee.

UNPUBLISHED

February 6, 2007

No. 265567

Kent Circuit Court

LC No. 05-002855-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm by a felon, MCL 750.224f. Defendant was also charged as a second controlled substance offender, MCL 333.7413(2), and as a second habitual offender, MCL 769.10. The trial court dismissed the charges against defendant due to the prosecution's failure to comply with a pretrial discovery order. The prosecutor appeals as of right, and we affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant waived a preliminary examination and pleaded not guilty. Defendant was bound over to the circuit court for trial. On March 22, 2005, the chief judge of the Kent Circuit Court sent an order to the parties that required all requests for discovery to be filed with the court no later than fourteen days from the date of the order.

Defense counsel requested discovery on March 17, 2005, and as of the status conference held on May 3, 2005, the defense had yet to receive a lab report regarding the drugs allegedly found in defendant's house. At the status conference, the prosecution put a plea offer on the record. However, defense counsel stated that his client was unable to make an intelligent decision on the offer because discovery had not been completed.

On May 13, 2005, defense counsel filed a motion to enforce discovery compliance by the prosecution. Counsel argued that he could not properly prepare a case without the relevant lab reports. The trial court ruled that it would hold a show cause hearing to determine whether the case should be dismissed.

At the show cause hearing, the prosecution indicated it had yet to comply with discovery because defense counsel had never contacted its office other than with a standard discovery

request. The trial court confirmed on the record that the defense had made a proper and regular discovery request on March 17, 2005, and that a copy of that request was in the court file along with the chief judge's discovery order. The trial court then questioned the prosecutor as to whether there was any ground on which to deny of the defense's discovery request. The prosecutor argued that contrary to the practice of law in the community and the "standard rule," defense counsel never asked the particular prosecutor assigned to the case for discovery.

The trial court ordered the case dismissed without prejudice because the laboratory reports sought on March 17th had yet to be produced by the prosecutor in violation of the court's order.

On appeal, the prosecution argues that the trial court abused its discretion in dismissing the criminal prosecution against defendant. We cannot agree. A trial court's decision regarding the appropriate remedy for noncompliance with a discovery order is reviewed for an abuse of discretion. MCR 6.201(J); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations; instead, there may be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, it has not abused its discretion and so the reviewing court should defer to the trial court's judgment. An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In addition, the trial court's exercise of discretion regarding noncompliance with a discovery order involves a balancing of interests of the courts, the public, and the parties. *Davie, supra* at 598. The exercise of discretion "requires inquiry into all the relevant circumstances, including 'the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.'" *Id.*, quoting *People v Taylor*, 159 Mich App 468, 482; 406 NW2d 859 (1987).

In *Davie*, this Court found that the trial court did not abuse its discretion in dismissing the case for a violation of a pretrial discovery order. *Davie, supra* at 598-599. This Court wrote that dismissal of the charges was not unwarranted or unnecessarily harsh, stating that neither the police nor the prosecutor in that case had complied with discovery orders, claiming instead to be following an unwritten informal procedure. *Id.* This Court noted that while the prosecutor and the public had an interest in seeing the case to trial, the trial court had a great interest in forcing present and future compliance with formal discovery orders, maintaining proper judicial supervision of the discovery process, and eliminating the use of informal methods. *Id.* at 599.

The instant case also involves the violation of a pretrial discovery order. Here, the trial court gave the prosecution several opportunities to turn over the discoverable material or explain why the material had yet to be produced. As in *Davie*, the prosecution argued that it was following an informal discovery procedure. The prosecution submitted that the informal procedure of the local legal community dictated that defense counsel was to personally contact the particular prosecutor assigned to the case regarding discovery. The prosecution failed to otherwise justify the delay in discovery and was unable to cite any court rule or case law in support of its position.

Like the court in *Davie*, the trial court here had a strong interest in eliminating reliance on informal methods of discovery. While the prosecutor and the public undoubtedly had an interest

in seeing this matter proceed to trial, the trial court in the present case had a great interest in forcing present and future compliance with its formal discovery orders.

In addition, defendant was able to show actual prejudice by the delay in that he could not intelligently consider a plea offer. The prosecution suggests that the trial court could have avoided actual prejudice to defendant by the less severe remedy of granting a continuance of the plea-offer deadline. However, this is not a case in which granting a continuance as a remedy would have allowed defendant to properly prepare the case and thereby avoid prejudice. The trial court had already given the prosecution ample time to comply with the discovery order and the court rules, but the prosecution had demonstrated that it was not able to comply with these extended deadlines. Moreover, this is not a case in which excluding the evidence of the lab reports would have been a proper remedy. Excluding the evidence would have been paramount to dismissal since the prosecution would have been unable to prove the necessary drug charges without the laboratory reports. The prosecution's continued defiance of the discovery order gave the trial court no option other than dismissal of this case without prejudice, allowing the prosecution to refile charges in the future should it so desire. See *id.* at 600. The court properly balanced the interests of the court, the public, and the parties, and did not abuse its discretion in dismissing the charges against defendant without prejudice.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper